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IN THE

Supreme Court of the United States

October Term, 1965

No. 629

KIMBERLY STEIN, a minor, by AUDREY H. STEIN, his parent and next friend, *et al.*,

Petitioners,

against

ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York,

and

MAX J. RUBIN, *et al.*, constituting the Board of Education of the City of New York,

and

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION OF BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

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IN THE

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BRIEF IN OPPOSITION OF BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

Opinions Below

The opinion of the United States District Court for the Eastern District of New York (Bruchhausen, J.), is reported at 224 Fed. Supp. 757.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 348 Fed. 2d 999.

Jurisdiction of this Court

The order of the United States Court of Appeals for the Second Circuit was entered on July 7, 1965. Jurisdiction to review the judgment of the said Court of Appeals is conferred on this Court by Title 28 U. S. C. Section 1254.

Questions Presented

1. Did not the High Court, when it prohibited a local board of education from "sanctioning" daily prayers in the public schools (*Engel*) include a prohibition against any teacher or principal from selecting and directing, as he for practical reasons must, any such daily prayers to be said out loud and in unison, even where there is no compulsion, and even when some or all of the specific parents involved do not object, or even request such procedure? And, hence, is not the order of the Court of Appeals in the cause at bar simply a restatement of the pertinent decisions of the United States Supreme Court?

2. Did not the District Court lack jurisdiction over the subject matter, when previous decisions of the United States Supreme Court have completely foreclosed the existence of any substantial Federal question?

3. Viewed against the decisions of this Court in *McCollum, Engel* and *Schempp* and *Murray,* does not a complaint asking for the right to say prayers, out loud and in unison, in the public schools during the school day, based on the absence of compulsion, and based on the consent of some or all of the parents, fail to state a claim upon which relief can be granted?

4. Should not the writ of certiorari be denied where the Court of Appeals not only

a. correctly decided the issue, *but also*

b. could have based its decisions on two other valid grounds;

and where

c. all three of these grounds on which the correct decision of the Court of Appeals was or could have been grounded, are squarely based on previous, consistent and clear decisions of this Court, thus making any further pronouncement by this Court wholly unnecessary?

Statutes Involved

Constitutional Provisions Involved

The First Amendment to the Constitution reads in pertinent part as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *"

The first section of the Fourteenth Amendment to the United States Constitution reads as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State therein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Excerpts from New York Educational Law

"§ 207. Legislative power. Subject and in conformity to the constitution and laws of the state, the

regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except, as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trusts conferred or charged upon the university and the education department. * * *"

"1709. Powers and duties of boards of education.

"The said board of education of every union free school district shall have power, and it shall be in its duty:

"1. To adopt such by-laws and rules for its government as shall seem proper in the discharge of the duties required under the provisions of this chapter.

"2. To establish such rules and regulations concerning the order and discipline of the schools, in the several departments thereof, as they may deem necessary to secure the best educational results.

"3. To prescribe the course of study by which the pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant.

* * *

"13. To have in all respects the superintendence, management and control of said union free schools * * *

* * *

"33. To have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes.

* * *"

"§ 2554. Powers and duties of board of education.*

"Subject to the provisions of this chapter, the board of education in a city shall have the power and it shall be its duty:

"1. To perform any duty imposed upon boards of education or trustees of common schools under this chapter or other statutes, or the rules of the regents and regulations of the commissioner of education so far as they may be applicable to the school or other educational affairs of a city, and not inconsistent with the provisions of this article * * *

* * *

"11. To authorize the general courses of study which shall be given in the schools and to approve the content of such courses before they become operative.

* * *

"13. a. To prescribe such regulations and by-laws as may be necessary to make effectual the provisions of this chapter and for the conduct of the proceedings of said board and the transaction of its business affairs, for the general management, operation, control, maintenance and discipline of the schools, and of all other educational, social or recreational activities and other interests under its charge or direction.

"b. In a city having a population of one million or more, the board of education shall prescribe such regulations and by-laws authorizing the superintendent of schools to exercise such of its administrative and ministerial powers as the board may deem necessary to make effectual the provisions of this chapter and for the general management, operation, control, maintenance and discipline of schools, and of all other educational, social or recreational activities and other interests under its charge or direction. If in the exercise of its discretion and in order better to discharge its policy-making and other functions and to provide for the efficient administration of the educational sys-

* This section applies to the City School Districts of the Cities of New York, Buffalo, Rochester, Syracuse, Yonkers and Albany only.

tem, the board delegates any of its administrative and ministerial powers to the superintendent of schools, such superintendent shall exercise such delegated powers in the same manner and with the same force and effect as if such powers were given to him under the provisions of the education law."

Statement of the Case

The statement of the case, as required by Rules 24, 39 and 40 of the Rules of this Court is here subdivided into statements of, respectively, the procedural history and the factual background.

Procedural History

The supplemental summons and amended complaint are dated and verified, respectively, on March 29, 1963.

In view of the pendency, at the time, of the decision of the United States Supreme Court in *Abington Township* v. *Schempp* and *Murray* v. *Curlett*, and for other reasons after the decision in these cases was handed down, the time of respondents to answer or otherwise move with respect to the amended complaint was extended by stipulation until October 30, 1963.

Instead of interposing answers, all respondents on October 22, 1963, noticed motions to dismiss the amended complaint for lack of jurisdiction over the subject matter and for failure of the amended complaint to state a claim upon which relief can be granted.

Petitioners, on November 6, 1963, noticed motion for summary judgment. Affidavits in opposition to and support for such motion were filed.

The cause was argued before the United States District Court for the Eastern District of New York, District Judge Bruchhausen presiding.

Thereafter, on December 20, 1963, and without giving respondents an opportunity to interpose answers to the amended complaint and, therefore, without having any allegations of the said complaint either admitted or denied, *i.e.*, without any proper factual basis for arriving at a judgment, the District Court handed down its decision, granting petitioners' motion for summary judgment and denying respondents' motions.

The order of the District Court was thereafter signed by Judge BRUCHHAUSEN, incorporating therein, at respondents' request, a stay of execution *pendente lite*.

Respondents thereupon appealed from that decision pursuant to 28 U. S. C. Section 1291. The case came on for oral argument before Chief Judge LUMBARD and Circuit Judges FRIENDLY and ANDERSON, and the Court of Appeals, by FRIENDLY, C. J., reversed the District Court (348 Fed. 2d 999).

Petitioners now seek a writ of certiorari to the Court of Appeals.

Factual Background

It must here be immediately emphasized that for lack of an answer having been submitted, the "findings of fact" contained in the decision of the District Court must be taken to mean "allegations of the amended complaint". It must further be emphasized that all material allegations of the complaint are deemed *admitted solely for the purpose of the motions to dismiss*, and that such admissions cannot be considered such for any other purpose. They cannot, particularly, be considered to be admissions for the purpose of summary judgment.

The pertinent allegations of fact in the amended complaint are as follows:

Principal Oshinsky of P. S. 184, Whitestone, on or about October 5, 1962, ordered his kindergarten teachers to stop two certain stated prayers which had been said, out loud and in unison, by these kindergarten children in the morning and afternoon, up to that time. (Paragraphs numbered 7 and 8.)

It is, here, of utmost significance, that there is no allegation in the amended complaint anywhere, which would state that the kindergarten children, whose prayers were stopped by the principal, themselves selected the prayer and the time and place therefor, and prayed on an entirely spontaneous and voluntary basis rather than by having the teacher order them to pray, teaching them the wording of the prayer in question, and daily supervising and correcting their performance.

Up to this point, therefore, there is no connection between the various statements in later paragraphs of the amended complaint relating to the voluntary nature of prayers allegedly prohibited by the Board of Education and the Board of Regents.

Thus, as to the seven of the 21 infant petitioners who were attending kindergarten, there is *not even an allegation that the kindergarten prayers referred to in paragraphs 7 and 8 of the amended complaint were actually "voluntary"*. Nor is there even an allegation as to just how such prayers might be claimed or considered to be "voluntary".

As to the remaining 14 infant petitioners who were attending higher grades and were not at all involved in the prohibited kindergarten prayer, there is no allegation whatever that they ever prayed in school at all.

Hence, it is clear from the complaint, that all that is involved here is the presumed fact that the parents of the seven kindergarten children did not object to their children

praying in school. This, of course, is the same factual situation that existed in McCollum, Engel and Schempp.

It will also be noted that the amended complaint states that two of the seven kindergarten children are Protestants, while the five other kindergarten children are Roman Catholic. The other 14 infant plaintiffs are divided among the Protestant, Roman Catholic, Jewish, Armenian Apostolic and Episcopalian faiths.

There are two basic reasons why, as a matter of fact, such "voluntary" prayers cannot be voluntary, *i.e.*, must be directed by the school officials (be it the Board of Education, the Superintendent, principal, teachers or other school personnel).

1. In our pluralistic society, of which the public school is the prime exponent, there are bound to be pupils of many different faiths. Obviously, not all pupils will even know the same prayers. A specific prayer must be selected by somebody other than the pupils, *i.e.*, by the teacher or principal. *Hence, the school must play the moving role in the selection of any such prayer.*

2. More importantly, however, the school is responsible for the program of the school day. Children cannot be allowed to pick their own time to speak on whatever subject may strike their fancy; nor can they pick the subject on which they may wish to exercise their "freedom of speech", on which petitioners rely in part.

So, for this reason also, the school must be the moving force. Any other solution would obviously lead to chaos and disintegration of the school system. In fact, the District Court found it necessary, for these very reasons, to concede that the school authorities had to have the power to make "reasonable rules and regulations" on this subject.

This, in turn, of course makes the whole procedure impermissible under the decisions of this Court, as set forth below in the argument.

As far as the allegations of paragraph 11 of the amended complaint are concerned, the legal staff of the Board of Regents is not aware that the Board ever had any knowledge of this whole matter until the service of the amended complaint. It is true, however, that the Board at appropriate times made statements to the effect that it is expected that the schools of the State of New York will honor the decisions of the United States Supreme Court in relation to prayer and the reading of the Bible. No answer having been interposed, however, these allegations have been neither admitted nor denied.

ARGUMENT

POINT I

The decision of the District Court was properly reversed for being wholly contrary to the previous decisions of the United States Supreme Court.

It is respectfully submitted that the judgment and decree of the District Court was wholly contrary to the decisions of this Court as handed down over the years in a long and consistent line of decisions and particularly in the decisions in the *Engel* and *Schempp* and *Murray* cases (370 U. S. 421 and 374 U. S. 203).

The conclusions of law in the District Court decision are to the effect that

a. Kindergarten children have the "constitutional right" to say out loud and in unison "voluntary" prayers, necessarily taught to them by the teachers;

b. Any interference with that "right" is a violation of the Constitution; and

c. The School Board has the right to establish "reasonable rules and regulations" under which the children can say, out loud and in unison, such a "voluntary" prayer, in school and during school hours.

In addition to the various quotations on this subject set forth in Point II, below, the following statements of this Court are here pertinent:

> Voluntariness "*simply has no relevance to the establishment question,* if it is once found that the practices are essentially religious exercises designed at least in part to achieve religious aims through the use of public school facilities during the school day." (Emphasis supplied.)
>
> (Concurring Opinion of Mr. Justice BRENNAN, at 374 U. S. 288.)

And again:

> "* * * *it is constitutionally irrelevant that the State has not composed the material* for the inspirational exercises presently involved." (Emphasis supplied.)
>
> (Concurring Opinion of Mr. Justice BRENNAN, at 374 U. S. 232.)

In fact, the entire part of Mr. Justice BRENNAN's concurring opinion, labelled (IV)C, beginning on page 288, is singularly apposite to the practices here at bar, which are impermissible for all the reasons set forth in that part of said opinion. Attention is particularly called to that part thereof which quotes Mr. Justice FRANKFURTER's answer to a similar contention made in the *McCollum* case:

> "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of

> influence by the school in matters sacred to conscience and outside the school's domain. *The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.*" (Emphasis supplied.)

Apposite also is the language of the Supreme Court in *Engel* (pp. 430-431):

> "This is not to say, of course, that laws *officially prescribing a particular form of religious worship* do not involve coercion of [non-observing] individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the *indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.*" (Emphasis supplied.)

In this connection it is just as plain, as a matter of fact, that the teacher in the cause at bar obviously had to instruct and direct the kindergarten children, coming from "Protestant, Roman Catholic, Jewish, Armenian Apostolic and Episcopalian faiths" (Opinion of District Court, 224 F. Supp. at 758) in order for them to be able to recite, out loud and in unison, the two specific prayers here involved. It is apodictic that such a directive, even when based on previous parental consent or even request, amounts to an impermissible legislative act of a branch of State government, contrary to the Establishment Clause of the First Amendment as applied to the States through the Fourteenth Amendment.

Nor has any reasonable explanation been offered by or on behalf of these petitioners why these children have to pray in the public schools during school hours, i.e. why it is, that the opportunities to pray which all these children have daily, before and after school, in their respective churches and temples, and in their homes, and on Sundays, Satur-

days and other holidays, are so insufficient that the limited time they have for secular instruction in the public schools should be used therefor.

Under previous decisions of this Court it is crystal clear that Prayer belongs in the home and the church and synagogue, but not into the public schools.

> "The First Amendment commands government to have no interest in theology or ritual; * * * On matters of this kind government must be neutral" (*McGowan* v. *Maryland*, 366 U. S. 420, 563-564).

> "Neither [a State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs" (*Torcaso* v. *Watkins*, 367 U. S. 488, 495).

Apposite here also is the language of Judge DYE of the New York State Court of Appeals, from his dissent in *Engel*, which was upheld by the United States Supreme Court in 370 U. S. 421. Speaking of the voluntary prayer in *Engel*, he said that it

> "falls squarely within the categories of disability accounting for the decisions in *Everson* and *McCollum* (*supra*): use of public school classrooms during regular school hours, limitation of participation to those children whose parents consent and, in addition, being led by a teacher or by a person designated by the teacher. Under such announced purpose and method of performance, it cannot be less than instruction contrary to the establishment and freedom clauses, nor can the requirement be excused on the theory that the saying of the prayer—although conducted in the presence of the student body in the assembly hall of the classroom—is nonetheless a voluntary act, since no child is 'required or encouraged to join in said prayer against his or her wishes' (Answering Affidavit), or on the theory that during the saying the child may re-

main silent, leave the room or report late. This is no answer, for it contains the very elements the prayer is supposed to eliminate: divisiveness, a type of compulsion, exerting as it does a pressure which an immature child is unable to resist because of his inherent desire to conform, and constituting a subtle interference by the State with the religious freedom guaranteed by the First Amendment. As Mr. Justice FRANKFURTER so aptly phrased it: 'Separation means separation, not something less * * *. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart' (*McCollum, supra*, p. 231).

"The inculcation of religion is a matter for the family and the church. In sponsoring a religious program, the State enters a field which it has been thought best to leave to the church alone. However salutary the underlying purpose of the requirement may be, it nonetheless gives to the State a direct supervision and influence that overstep the line marking the division between church and State and cannot help but lead to a gradual erosion of the mighty bulwark erected by the First Amendment. This does not mean that the State is or should be hostile to religion—merely that the State should not invade an area where the constitutionally protected freedom is absolute and not open to the vicissitudes of legislative or judicial balancing" (10 N. Y. 2d 189, 191).

That the decision of the District Court is contrary to such previous decisions of the High Court is further highlighted by the fact that the District Court found it necessary to concede to the School Board the power to make "reasonable rules and regulations" under which such "voluntary" prayers are to be held, so as to accommodate such prayers to the School Board's "power and obligation to conduct its affairs, including programming of classes and maintenance of discipline" (224 F. Supp. at 760). Thus, the decision of

the District Court is strictly contrary to *Engel* (370 U. S. at 435):

> "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing *or sanctioning official prayers* * * *".

The "reasonable rules and regulations", which the District Court's decision below specifically invites and authorizes, are clearly a "sanctioning" of a "particular form of prayer which [thus] is to be used as an official prayer in carrying on [such] program of governmentally sponsored religious activity" (370 U. S. at 430).

And yet:

> "Under that [first] Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, *government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer* which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity" (Emphasis supplied). (370 U. S. at 430).

Nor has *Pierce* (268 U. S. 510) anything to do with the cause at bar. The decision there struck down a state prohibition against attendance of school age children at private and parochial schools. The decision neither states nor implies that parents have the "right", first having chosen the public schools for the attendance of their children, then in addition also to determine the program of the public schools in accordance with their own religious convictions. If the parents select the public schools, the children are subject to all the constitutional limitations of such schools. In our pluralistic society any other arrangement would obviously lead to chaos and would be subject

to the same constitutional infirmities as lead to the decisions in *Engel* and *Schempp* and *Murray*. There is no conflict among any of these decisions.

It is realized, of course, that while the Court of Appeals did not actually and expressly state that the Establishment Clause of the First Amendment prohibits New York from permitting these so-called "voluntary" prayers—nor did it, of course, state, as petitioners allege, that the First Amendment does not prohibit them—the implication is clear that that is, as it must be, the rationale of its decision.

It is respectfully submitted that the decision of the District Court had to be reversed as being in complete conflict with the pertinent previous decisions of this Court.

It is further submitted that since the Court of Appeals based its decision entirely on previous decisions of this Court which clearly establish the rules and rationale for governmental action in this delicate field, there is no need for granting this writ and the petition therefore should be denied.

POINT II

The District Court could have been reversed because on the previous decisions of this Court, it was without jurisdiction over the subject matter.

The only allegations of the amended complaint which can be considered, at least by implication, to address themselves to the issue of jurisdiction of the District Court over the subject matter, are paragraphs 16, 19 and 20.

Paragraph 16 alleges that the said prohibition violates the Free Exercise Clause and the Free Speech Clause of the First Amendment of the United States Constitution as

made applicable to the States by the Fourteenth Amendment.

Paragraphs 19 and 20 allege that a non-discretionary duty to allow voluntary prayers in the public schools is imposed upon the defendants by the Constitution of the United States.

It must be noted at the outset that there is an absolute absence of any allegation of ultimate fact to support the completely conclusory allegation of the "voluntary" nature of these prayers; there are no allegations that, before the principal's order to discontinue, the kindergarten prayers in question were selected by the little children themselves; that the children themselves decided upon the precise moment when they wanted to say them; that they agreed that one of them would lead them off or else agree on some other method of actually arriving at a single prayer, said out loud and in unison at a specific time; that they asked the teacher to allow them to take time from the secular program of instruction; that the teacher agreed to do so; as to just what the role of the teacher was in this procedure.

If there is anything "amorphous" (to use petitioners' phraseology) about this case, it is the complete and abysmal darkness in which the amended complaint leaves the reader as to what the actual facts of the case are, on which facts after all, the entire case must stand or fall.

The following quotation is applicable here:

> "The prerequisites of the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. *He must allege in his pleading the facts essen-*

tial to show jurisdiction. If he fails to make the necessary allegations he has no standing." (Emphasis supplied.)

McNutt v. *General Motors, etc. Corp.*, 298 U. S. 178 at 189.

To the same effect see the following decisions and cases cited therein:

American Distilling Co. v. *City of Sausalito*, 73 F. Sup. 520;

Troy Laundry Co. v. *Lockwood*, 63 F. Sup. 384;

Buck v. *Case*, 24 F. Sup. 541 (Reversed on procedural grounds 307 U. S. 95).

Diversity of citizenship is not here involved; nor does the amended complaint contain any allegation of a monetary loss to the petitioners either individually or collectively, exceeding the sum or value of ten thousand dollars (28 U. S. C. §§ 1331, 1332).

Consequently, in order for the District Court to acquire jurisdiction of the subject matter of the amended complaint, petitioners would have been required in their pleading to allege facts essential to show *jurisdiction under subdivision 3 of Title 28 U. S. C. Section 1343 or Title 42 U. S. C. Section 1983.*

For this purpose petitioners would have needed to show deprivation under color of any State law, statute, ordinance, regulation, custom or usage, by the respondents, the Board of Regents of the University of the State of New York, of any right, privilege or immunity secured to the petitioners by the Constitution of the United States.

In order to utilize this basis for jurisdiction of the District Court over the subject matter of the amended complaint, it would be necessary that the United States *Con-*

stitution secure to the petitioners the right or privilege to use the public schools and the public school time for the purpose of religious exercises.

In determining jurisdiction here, however, the finding of a substantial Federal question is completely foreclosed by the decisions of this Court in *Engel* v. *Vitale*, 370 U. S. 421, and the *Schempp* and *Murray* cases, 374 U. S. 203.

Particularly, this Court in the *Engel* case stated its position that "each separate government in this country should stay out of the business of writing *or sanctioning* official prayers" (370 U. S. at 435).

The argument that voluntary prayers would take such practices out of the category of the impermissible was rejected specifically in the same case at page 430:

> "Neither the fact that the prayer may be denominationally neutral, *nor the fact that its observance on the part of the students is voluntary* can serve to free it from the limitations of the Establishment Clause." (Emphasis supplied.)

It is obvious, therefore, that this provision of the Code cannot be a sufficient basis to establish jurisdiction of the District Court over the subject matter.

> "The question of jurisdiction [other than questions relating to diversity of citizenship which is not here involved] * * * is to be determined by the allegations of the bill, and not upon the facts as they may turn out, or by a decision of the merits * * *. If the * * * complaint sets forth *a substantial claim*, a case is presented within the federal jurisdiction * * *. But jurisdiction * * * is wanting where the claim set forth in the pleading is *plainly unsubstantial*, * * *. And the federal question averred may be *plainly unsubstantial* either because obviously without merit, or *'because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the sub-*

ject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" (Emphasis supplied.)

Levering and Garrigues Co. v. *Morrin,* 289 U. S. 103, 105 (and the numerous cases cited therein);

"When a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a federal question."

Kansas v. *Bradley,* 26 Fed. 289, 290.

See also:

Hannis Distilling Co. v. *Baltimore,* 216 U. S. 285, 288;
McGilvra v. *Ross,* 215 U. S. 70, 76-77, 80;
Norton v. *Whiteside,* 239 U. S. 144, 153;
Bianchi v. *Morales,* 262 U. S. 170;
Harris v. *Rosenberger,* 145 Fed. 449, 452;
Gilstrap et al. v. *Standard Oil Company et al.,* 108 F. 2d 736; certiorari denied 311 U. S. 661;
Water Service Company v. *Redding,* 304 U. S. 252.

It must be kept in mind that what is sought here is an order directing the School Board "to afford the plaintiffs an opportunity to express their love and affection to Almighty God each day through a prayer, voluntarily offered in their respective classrooms."

In fact, the decision of the District Court necessarily concedes the "right" of the School Board to make rules and regulations about the manner of affording such opportunity, *i. e.* of "sanctioning" (*cf.* 370 U. S. at 435) such a prayer, which thus obviously becomes an official prayer.

It might be noted parenthetically that the District Court quotes the following language from *Engel* (370 U. S. 430-431):

> "Neither the fact that the prayer may be denominationally neutral, *nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause* * * *." (Emphasis supplied.)

In any event, it must be kept in mind here, that there can be no doubt that these kindergarten children, as a matter of indisputable fact, are actually incapable of saying these prayers, in unison, *without the instruction, direction and order of the teacher,* especially when they come, as the District Court found, from vastly divergent religious backgrounds ("These plaintiffs are members of Protestant, Roman Catholic, Jewish, Armenian Apostolic and Episcopalian faiths". 224 F. Supp. at 758).

Quite apart, of course, from the tender age of the petitioners herein were involved in the kindergarten prayer, the same principles are applicable to pupils of any age and grade. The basic vice of petitioners' position is that the school must actively *"sanction"* (370 U. S. 435) and *regulate* such "voluntary" prayer to make it possible.

It is thus obvious that orders, and rules and regulations of a branch of State Government are required to accomplish the purpose sought, which orders, and rules and regulations necessarily place these procedures into the same category as the procedures declared impermissible in the ENGEL *and* SCHEMPP *and* MURRAY *cases.*

It is true, of course, that the Court of Appeals expressly disagreed with respondents on this point, relying on *Bell* v. *Hood,* 327 U. S. 678. That case, however, is clearly distinguishable from the cause at bar.

In *Bell,* F. B. I. agents violated constitutional rights (see statement of Court of Appeals in that case, "that * * * [if allegations are correct] the plaintiffs' legal rights have

been ruthlessly violated"). The question there turned on availability of monetary damages under Federal law under such circumstances. Here there is no such procedural question involved and the existence of claimed "rights" has already adversely been decided by this Court.

Here we are dealing with amorphous and conclusory allegations of "voluntary" prayer, based on no allegations of ultimate facts to support such conclusory allegations.

Jurisdiction in such a case could be found only where the Constitution clearly grants public school pupils the "right" to pray in the public schools under conditions which obviously require participation of the school authorities—but previous decisions of this Court clearly foreclose any possibility of such a finding.

It is therefore submitted that the finding of a substantial Federal question in the cause at bar could well have been found to be completely foreclosed by previous decisions of this Court; consequently, it could well have been found that the District Court had no jurisdiction over the subject matter and this could well have been an additional basis for the actual reversal by the Court of Appeals; and since this additional possible ground for reversal is based on previous decisions of this Court, this is an additional basis for denying the writ.

POINT III

The District Court could have been expressly reversed for failure of the amended complaint to set forth a claim supporting relief.

It appears here to a certainty that petitioners would not be entitled to any relief under any state of facts which could be proved by them under the amended complaint,

construed in the light most favorable to them and with all doubts resolved in their favor.

Welcher v. *U. S.*, 14 F. R. D. 235;
Halliburton Company et al. v. *Norton Drilling Company*, 302 F. 2d 431.

The sole claim which petitioners seem to make as to why the issues in the amended complaint are in any manner different from those heard and decided by this Court in the cases of *Engel* v. *Vitale*, 370 U. S. 421, and *Schempp* and *Murray*, 374 U. S. 203, is the language of the allegation which states: "even where the opportunity to pray is sought by the students themselves."

New York State Law vests the Board of Education with the most broad and sweeping powers over all affairs of the schools under its jurisdiction (see New York State Education Law, Section 2554, subdivisions 1, 11 and 13; and by devolution through subdivision 1 of the same section, Section 1709, subdivisions 1, 2, 3, 13 and 33).

Because of these broad powers and duties, the said Board of Education is responsible for compliance with State and Federal laws, statutory or decisional, in all actions and procedures used or had in the public schools under its jurisdiction.

To "allow" students to spend the comparatively limited time during which they are required to attend classes in any manner based upon their own desires, rather than on rules and regulations of the Board of Education, the Superintendent, or principals and teachers, *would be to invite chaos.*

It is apodictic that the entire program of the school for each and every minute of the school day is entirely under the control and direction of the Board of Education,

which may delegate various determinations in this respect to subordinates, such as the superintendent, principals or teachers.

The Board of Regents of the University of the State of New York, pursuant to Education Law, Section 207, is charged with legislative functions concerning the educational system of the State, and the function of determining educational policies. The Board of Regents, except as to the judicial function of the Commissioner of Education, is responsible for the establishment of rules carrying into effect the laws and policies of the State relating to education.

All respondents are thus charged by law with the enforcement of all general and special laws relating to the educational system of the State, within their respective spheres, and the action taken by each and every one of them merely carried out their duties under the United States Constitution as expounded by this Court in the *Engel* and *Schempp* decisions.

The attempt to distinguish the "facts", implied rather than alleged in the amended complaint, from the facts of the cases decided by this Court *is purely an exercise in semantics.*

The argument that the voluntary nature of participation by students in any prayer removes such procedure from the category of the impermissible was made in *Engel* (*supra*) and was rejected by the Court in the following words:

> "Neither the fact that the prayer may be denominationally neutral, *nor the fact that its observance on the part of the students is voluntary* can serve to free it from the limitations of the Establishment Clause" (Emphasis supplied.) (p. 430).

And again at page 435:

> "It is neither sacrilegious nor antireligious to say that *each separate government in this country should stay out of the business of writing or sanctioning official prayers* and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance" (Emphasis supplied).

In the more recent case, the Court said:

> "Finally we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs. Such a contention was effectively answered by Mr. Justice JACKSON for the Court in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943):
>
> > 'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to * * * freedom of worship * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no election' " (374 U. S. page 225).

Petitioners' attempt to base their case on the Free Exercise Clause of the First Amendment, but in doing so they completely disregard the Establishment Clause thereof. In the *Schempp* and *Murray* cases, the relationship between these two parts of our constitutional safeguards of religious freedom are discussed in great detail, and such discussion clearly shows that the amended complaint herein utterly fails to state a claim supporting relief.

Mr. Justice BRENNAN's concurring opinion is apposite here:

> "The Framers did not entrust the liberty of religious beliefs to either clause alone. The Free Exercise Clause 'was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith.' *McGowan* v. *Maryland*, *supra*, at 464 (opinion of FRANKFURTER, J.)" (374 U. S. page 256).

And again in the majority opinion:

> "The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion *while the Establishment Clause violation need not be so attended*" (Emphasis supplied.) (374 U. S. page 223).

The majority opinion quotes from the *Everson* case (330 U. S. 1—the language of Mr. Justice RUTLEDGE speaking for the four dissenters):

> "'Our constitutional policy * * * [D]oes not deny the value or necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does *deny that the state can undertake or sustain them in any form or degree.* For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the two-fold protection and, as the state cannot forbid, neither can it perform *or aid in performing the religious function.* The dual prohibition makes that function altogether private.' *Id.*, at 52" (Emphasis supplied.) (374 U. S. page 218).

Further, the following language from *Schempp* is here apposite:

> "Second, this Court has rejected unequivocally the contention that the establishment clause forbids only governmental preference to one religion over another. Almost 20 years ago in *Everson*, *supra*, the Court said that '[n]either a state nor the Federal government can set up a church. Neither can pass laws which

aid one religion, *aid all religions*, or prefer one religion over another.' And Mr. Justice JACKSON, dissenting, agreed:

> 'There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take *every form of propagation of religion* out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense * * *. This freedom was first in the Bill or Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength as it rigidity.' *Id.*, at 26.

"Further, Mr. Justice RUTLEDGE, joined by Justices FRANKFURTER, JACKSON and BURTON, declared:

> 'The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the Colonies. Necessarily it was *to uproot all such relationships*. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.' *Id.*, at 31-32.

"The same conclusion has been firmly maintained ever since that time, see *Illinois ex rel. McCollum, supra*, at pp. 210-211; *McGowan* v. *Maryland, supra*, at 442-443; *Torcaso* v. *Watkins, supra*, at 492-493, 495, and we reaffirm it now." (Emphasis supplied.) (347 U. S., page 216).

The Court in *Schempp* quotes from *Engel* as follows:

> "'Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether

those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' *Id.*, at 430-431" (374 U. S., page 221).

In sum, the two decisions of this Court referred to above clearly show that no school child has any constitutionally secured right to perform religious exercises on school grounds and during school time, as contended for here by petitioners. For the Board of Regents, the Board of Education, the Superintendent of Schools, or a principal or teacher to permit or, in the language of this Court in *Engel* to *"sanction"* such a procedure would clearly violate the Establishment Clause of the First Amendment of the United States Constitution.

It should also be noted that all the programs at issue in the *Engel* case and the *Schempp* case, as well as in *McCollum* (333 U. S. 203) were voluntary programs. Nobody was compelled to participate in any of these programs, and yet this Court struck them down.

It is submitted that permissible procedures in this direction are limited to the released time program which is in existence in many schools of the State of New York and is, in fact, grounded in State law. Such released time program was upheld by the United States Supreme Court in *Zorach* v. *Clauson*, 343 U. S. 306. One other procedure is also permissible in this general area and it was pointed out by Mr. Justice BRENNAN in his concurring opinion in *Schempp and Murray*. It is the establishment by the school authorities, if they wish to do so, of a "moment of reverent

silence" (374 U. S. at 281). The use of this procedure is referred to in detail in two judicial decisions of the New York State Commissioner of Education (who has judicial powers over the State school system under State law). These two decisions (*Matter of Rubinstein*, 2 Ed. Dept. Rep. 299, and *Matter of Worthing*, 3 *id.* 7, are reproduced in full in the Appendix to our brief below pp. A12 and A19 (see also Point IV, below).

The contention of petitioners that the respondents' action also violates the constitutional guarantee of freedom of speech, was acknowledged by District Court as one of the issues, but the said Court wasted no further time on such contention.

The Court of Appeals on the other hand properly rejected this argument completely, based on the decision of this Court in *Poulos v. New Hampshire*, 345 U. S. 395, 405:

> "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. It is a *non sequitur* to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary."

Such a contention cannot be anything but frivolous. It was hardly the intent of the Framers (quite apart from the State-Church aspect of the matter) to guarantee to kindergartners the right to speak in school and during school hours on any subject of their own choosing, out loud and in unison! Nor, of course, can there be any doubt that these children are, as a matter of fact, *incapable of performing such a feat without the instruction, guidance and direction of the teacher*, which fact alone necessarily

eliminates the Freedom of Speech guarantee from any consideration in this matter. The same principle, of course, applies to any age or grade of pupils, because the school program cannot be left to the whims of pupils as to what they will do, discuss or speak about at any time. Any contrary holding would effectively terminate all organized instructional programs.

Thus, it is respectfully submitted that the decision of the Court of Appeals was correct for this reason also.

Thus, further, since this Court has already established the basic principles, it is obvious that this additional ground on which the decision of the Court of Appeals could have been expressly based shows that no writ is needed and the petition should be denied for this reason also.

POINT IV

For all the foregoing reasons the petition for writ of certiorari should be denied.

Since there are at least two other grounds on which the decision of the District Court herein could have been reversed, in addition to the ground actually and expressly used by the Court of Appeals *and since all three of these grounds are based entirely on consistent previous decisions of this Court,* there is obviously no need to review the decision of the Court of Appeals.

The matter of prayer in the public schools has been exhaustively treated by this Court in *McCollum, Engel* and *Schempp* and *Murray* and it is time to lay this matter to rest.

The scheme here semantically sought by petitioners is subject to exactly the same constitutional infirmities as the

schemes found impermissible in the three decisions referred to, and for exactly the same reasons. The very order of the District Court clearly indicates that such scheme cannot work without the active participation, the "sanctioning" of the appropriate levels of government.

As this Court has pointed out repeatedly, the training of our youth in matters of religion belongs in the homes and churches and does not belong in the public schools.

It is our homes and churches and synagogues which are charged with the responsibility for carrying on the religious heritage of our country.

There are a number of ways in which religious training through home and school can properly be supplemented in the public schools and without violating constitutional principles.

Among these are the "released time" program (*Zorach* v. *Clauson*, 343 U. S. 306); the daily recitation of the Pledge of Allegiance including the words "under God", under statutory mandate in the State of New York (14 N. Y. 2d 867,* certiorari denied 379 U. S. 923); "moments of reverent silence" (374 U. S. at 281), as supplemented by the two judicial decisions of the Commissioner of Education in *Matters of Rubinstein*, 2 Ed. Dept. Reps. 299 and *Worthing*, 3 *id.* 7, which are reproduced in full in the Appendix to our brief below (pages A-12 and A-19); appropriate prayers, such as invocation and benediction and others at "patriotic and ceremonial occasions" (370 U. S. 435, fn. 21); as well as teaching about religion which, as the Commissioner of Education of the State of New York has pointed out is clearly a necessary part of any course in social studies. All of these are acknowledgements of the fact that "ours is a religious nation" (143 U. S. at 470), are constitutionally

* *Lewis* v. *Allen*.

permissible and have been so declared by this Court. These, however, represent the boundary of the constitutionally permissible.

The writ, it is respectfully submitted, should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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